Michaelmas Term
[2020] UKPC 32
Privy Council Appeal No 0045 and 0050 of 2017

JUDGMENT

Crick and another (Appellants) *v* Kurt Brown (Respondent) (Trinidad and Tobago)

Philip (Appellant) v Commissioner of Police and another (Respondents) (Trinidad and Tobago)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lord Lloyd-Jones
Lord Briggs
Lord Sales
Lord Hamblen
Lord Leggatt

JUDGMENT GIVEN ON

30 November 2020

Heard on 19 October 2020

Appellant (Crick)
Colvin Blaize

(Instructed by Invictus Chambers)

Respondent (Philip)
Rowan Pennington-Benton

(Instructed by Charles Russell Speechlys LLP)

Appellant (Philip)
Navindra Ramnanan

LORD SALES:

1. This is the judgment in two appeals which give rise to similar issues regarding the consequences which a court in Trinidad and Tobago operating under the Civil Procedure Rules in that jurisdiction may impose where a party fails to file a written skeleton argument in proper time in accordance with case management directions set by the court. The facts of the two cases may be shortly stated.

Crick v Brown

2. This case arose out of a dispute over a plot of land. Mr Brown claimed that Judy Crick and Nancy Crick ("the Cricks") had unlawfully occupied the plot and succeeded in that claim at trial in 2013. The court made an order for possession and awarded damages for trespass. The Cricks appealed. The Court of Appeal ordered a stay of execution of the order made at first instance.

3. On 8 July 2016 Mohammed JA gave directions at a Cause List Hearing and listed the appeal for hearing on 12 April 2017. The directions were in conventional form. They stated that the Cricks were to file and serve written submissions and authorities on or before 29 December 2016; Mr Brown was to file and serve written submissions and authorities on or before 28 February 2017; and the Cricks were to file and serve written submissions and authorities in reply on or before 17 March 2017. The order for directions did not set out what sanction might apply if there were default by the parties.

4. The Cricks wholly failed to comply with the directions. No written submissions were filed or served by them at all. As a result, Mr Brown did not file written submissions either. Instead, when the appeal was called on for hearing on 12 April 2017 counsel for the Cricks asked for an adjournment to enable him to prepare and file written submissions. Counsel for Mr Brown did not object to the request.

5. But the Court of Appeal most certainly did object, and rightly so. No excuse was offered for the failure by the Cricks to file their written submissions in compliance with the court's directions. The appeal had been listed for a hearing taking up the whole day. If an adjournment were granted, it would mean that a day of the court's time would be wasted and another day would have to be found in future to hear the appeal. This would have been to the detriment of other litigants, the hearing of whose case would have to be pushed back in time as a result. This could not be justified. Waiting times for the hearing of appeals in Trinidad and Tobago are long, and the Court of Appeal is rightly concerned to keep them within bounds or reduce them so far as is possible since justice

delayed is justice denied. Having regard to the interests of other litigants, the Court of Appeal refused the Cricks' application for an adjournment. There is no appeal against that decision.

6. The Court of Appeal therefore proceeded to hear the appeal. The question arose whether counsel for the Cricks should be permitted to present submissions in support of the appeal in circumstances where he had failed to give notice to the court or to Mr Brown by way of filing written submissions of the submissions he proposed to make. Although counsel for Mr Brown had been prepared to agree an adjournment, he did not accept that in these circumstances it would be fair for the Cricks' counsel to make oral submissions in support of the appeal. The Court of Appeal decided that it would be unfair to Mr Brown to allow the Cricks to seek to advance the appeal by making submissions of which no notice had been given. The court also pointed out that its members had been deprived of the opportunity of preparing for the hearing by pre-reading the written submissions in support of it, which was liable to jeopardise the efficient and effective use of the time which had been made available that day for the hearing of the appeal. Therefore the court refused to give permission for the Cricks' counsel to present the appeal by way of substantive oral submissions about the case.

7. Thus the position arrived at was that the Cricks' appeal had come on for hearing but no submissions were presented in support of it. The inevitable consequence was that the court made an order dismissing the appeal. This was an order made by way of a substantive determination of the appeal on the merits. The court did not make a procedural order to strike out the appeal.

8. The Cricks appeal to the Board against the order dismissing their appeal. When deciding whether to grant permission to appeal, the Court of Appeal treated the appeal as procedural in nature. However, in the Board's view, the appeal is in relation to the substantive determination of the Cricks' appeal. Nothing turns on this for present purposes.

Philip v Commissioner of Police and the Attorney General of Trinidad and Tobago

9. In 2007 Mr Philip was evicted by his sister from a house in Chaguanas. A police officer was present at the eviction.

10. Mr Philip originally commenced proceedings against his sister claiming that his eviction was unlawful. But his claim was withdrawn with the permission of the court in 2010.

11. In 2013 Mr Philip commenced the present proceedings by issuing a constitutional motion against the Commissioner of Police and the Attorney General ("the Commissioner and AG"), representing the state, claiming that the police officer had facilitated or participated in the unlawful eviction and that this had constituted a violation of his (Mr Philip's) rights under the Constitution of Trinidad and Tobago to protection of the law and protection of property.

12. On 11 October 2013 the High Court dismissed Mr Philip's constitutional claim on grounds of undue delay and also on the merits. He appealed to the Court of Appeal.

13. At a Cause List hearing on 8 July 2016 Mohammed JA listed the appeal for hearing on 5 April 2017 and issued directions, again in conventional form. Mr Philip was directed to file and serve written submissions and authorities on or before 29 December 2016; the Commissioner and AG to file and serve their written submissions and authorities on or before 28 February 2017; and Mr Philip was to file and serve written submissions and authorities in reply if necessary on or before 31 March 2017. Again, the order for directions did not set out what sanction might apply if there were default by the parties.

14. Mr Philip failed to file his written submissions by 29 December 2016. It appears that initially he experienced difficulty in finding counsel to act for him. But he made no application for an extension of time. Eventually he found counsel who agreed to act for him and his written submissions were filed late, on 24 February 2017. Again, there was no application for an extension of time to permit this.

15. The Commissioner and AG took no action to seek to have any sanction imposed in relation to the late service of Mr Philip's written submissions. Nor did they apply for an extension of time for filing their own written submissions as required by the directions issued by the court. They did not prepare or file any written submissions of their own. In fact, as emerged later, the previous lawyer with responsibility for handling the case had left the office of the Attorney General in January 2017 and the Commissioner and AG failed to instruct counsel for the appeal until the very last minute.

16. By letter to the court from the office of the Attorney General dated 3 April 2017, the Commissioner and AG informed the court that their counsel had "only now received the files in the matter", with the result that they were unable to file their written submissions. They asked for an adjournment to allow them time to file their written submissions and said that counsel for Mr Philip did not object to this.

17. The appeal was called on for hearing on 5 April 2017. The court was understandably and rightly aggrieved that the appeal had not been properly prepared for hearing by the parties. After some preliminaries the hearing began with an application

by Ms Khan, counsel for the Commissioner and AG, for the hearing to be adjourned in order to allow her to file written submissions on their behalf. She had only been instructed two days before. When asked by Mendonca JA whether she was ready to make her submissions orally she said she was not, because she had not had sufficient time to read the papers in the case.

18. The court did not rule on Ms Khan's application. Instead, Mendonca JA turned to Mr Ramnanan, counsel for Mr Philip, pointed out that his written submissions had been filed two months late with no application to extend time, and asked why the court should extend time for the filing of those submissions. No evidence had been filed by Mr Philip to explain the delay. The judge further observed that "because of the short time the state has had to prepare this matter, … the matter cannot go on today."

19. Mr Ramnanan told the court that previous counsel for Mr Philip had ceased to act in about July 2016 and that he (Mr Ramnanan) had been instructed only in about mid-February 2017. Mr Ramnanan said that Mr Philip was impecunious and so had had difficulty in finding counsel who would act for him. Pemberton JA pointed out that this did not explain why Mr Ramnanan, when instructed, did not promptly make an application for an extension of time to file the written submissions on behalf of Mr Philip, in circumstances where Mr Ramnanan must have appreciated that this could affect the entire timetable, including whether there could be an effective hearing on the listed hearing date. Mr Ramnanan could offer no excuse for this and accepted that he had been at fault.

20. The court treated Mr Ramnanan's submissions as an oral application to extend time for filing his written submissions. Mendonca JA gave a short ruling on behalf of the court. There was no good explanation for the failure to file the submissions when they became due in December 2016. Mendonca JA referred to the guidance given by the court in its decision in *Roland James v Attorney General of Trinidad and Tobago*, Civil Appeal No 44 of 2014, judgment of 19 December 2014, regarding extensions of time and said:

> "We think that on a proper review of the factors [identified in *Roland James*], particularly the failure to advance a good explanation and the impact it would have on the administration of justice, it is difficult for us to grant any extension of time in this case. What these Rules [the CPR] do is it embodies in the dispensation of justice or includes as an element of justice matters such as efficiency and expedition and proper use of court resources. It is not a matter purely of substantive law. I think if one looks at the circumstances in this case, where if we grant this extension that this matter will go off to another date and impact on other users of the court, it is not an appropriate case in which to

> grant an extension of time. The effect of that, the refusal to extend the time for delivery, or for the filing of the submissions, seems to us to lead inevitably to the position where the appeal would be dismissed, because it is the practice of these courts, in the interest of time and efficiency, to hear these matters largely on written submissions. We will, obviously, hear oral submission primarily to clarify what the written submissions say and to allow counsel the opportunity, if so required, to expand on any point. But the core approach is that we require full submissions in the hearing of appeals. So that the failure to file appeals impacts, in a very substantial way, on the ability of the court to do its business. So, in the circumstances of this matter, we will not extend the time for the filing of the submissions and we will dismiss the appeal for the reasons given."

21. As in the Cricks' case, the order made was that the appeal was dismissed. As in that case, this constituted the determination of the appeal as a substantive matter.

The Civil Procedure Rules

22. The following provisions of the CPR (2016 edition) have been referred to:

> **"Part 1: the overriding objective**
>
> 1.1 (1) The overriding objective of these Rules is to enable the court to deal with cases justly.
>
> (2) Dealing justly with the case includes-
>
> (a) ensuring, so far as is practicable, that the parties are on an equal footing;
>
> (b) saving expense;
>
> (c) dealing with cases in ways which are proportionate to
>
> (i) the amount of money involved;

(ii) the importance of the case;

(iii) the complexity of the issues; and

(iv) the financial position of each party;

(d) ensuring that it is dealt with expeditiously; and

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

Application by the court of the overriding objective

1.2 The court must seek to give effect to the overriding objective when it -

(1) exercises any discretion given to it by the Rules; or

(2) interprets the meaning of any rule.

Duty of the parties

1.3 The parties are required to help the court to further the overriding objective."

Part 26: case management – the court's powers

26.1 (1) The court (including where appropriate the Court of Appeal) may-

…

(d) extend or shorten the time for compliance with any rule, practice direction or order or direction of the court;

(e) adjourn or bring forward a hearing to a specific date;

…

(w) take any other step, give any other direction or make any other order for the purpose of managing the case and furthering the overriding objective.

Sanctions - striking out statement of case

26.2 (1) The court may strike out a statement of case or part of a statement of case if it appears to the court-

(a) that there has been a failure to comply with a rule, practice direction or with an order or direction given by the court in the proceedings;

…

Court's general power to strike out statement of case

26.3 (1) Where a party has failed to comply with any of these Rules or any court order in respect of which no sanction for noncompliance has been imposed the other party may apply to the court for an "unless order".

(2) Such an application may be made without notice but must be supported by evidence which-

(a) identifies the rule or order which has not been complied with and the nature of the breach; and

(b) contains a certificate that the other party is in default.

(3) The court office must refer any such application immediately to a master or judge who may-

(i) grant the application;

(ii) seek the views of the other party; or

(iii) direct that an appointment be fixed to consider the application and that the court office give to all parties notice of the date, time and place for such appointment.

…

(5) If the defaulting party fails to comply with the terms of any "unless order" made by the court his statement of case shall be struck out.

Court's powers in cases of failure to comply with rules, orders or directions

26.6 (1) Where the court makes an order or gives directions the court must whenever practicable also specify the consequences of failure to comply.

(2) Where a party has failed to comply with any of these Rules, a direction or any court order, any sanction for non-compliance imposed by the rule or the court order has effect unless the party in default applies for and obtains relief from the sanction, and rule 26.8 shall not apply.

Relief from sanctions

26.7 (1) An application for relief from any sanction imposed for a failure to comply with any rule, court order or direction must be made promptly.

(2) An application for relief must be supported by evidence.

(3) The court may grant relief only if it is satisfied that

(a) the failure to comply was not intentional;

(b) there is a good explanation for the breach; and

(c) the party in default has generally complied with all other relevant rules, practice directions, orders and directions.

(4) In considering whether to grant relief, the court must have regard to-

(a) the interests of the administration of justice;

(b) whether the failure to comply was due to the party or his attorney;

(c) whether the failure to comply has been or can be remedied within a reasonable time; and

(d) whether the trial date or any likely trial date can still be met if relief is granted.

(5) The court may not order the respondent to pay the applicant's costs in relation to any application for relief unless exceptional circumstances are shown.

…

Part 64 – Appeals to the Court of Appeal

Enforcement of time limits

64.13 (1) Subject to any directions given under rule 64.10 [expedited appeals], if-

> (a) no notice is given under rule 64.8 [action by court on receiving notice of appeal] and the appellant or any respondent who has served a counter-notice under rule 64.7 fails to make an application under rule 64.11 [delay in providing notes of evidence, etc];
>
> (b) the appellant fails to file the bundles of documents (or core bundle where appropriate) as required by rule 64.12 [record of appeal]; or
>
> (c) any party to the appeal fails to serve his skeleton argument within the time limits specified by or under the relevant rule or any extension permitted by the court, then any other party to the appeal may apply for the notice of appeal or counter-notice, as the case may be, to be struck out, or the court may with or without an application by any party to the appeal direct that notice be served on the appellant and on any respondent who has served a counter-notice to show cause why the notice of appeal or counter-notice should not be struck out."

Discussion

23. In both appeals the Board granted permission to appeal limited to the question whether the Court of Appeal had complied with CPR Part 26.6(1), in that in the directions orders issued in the two cases it had not specified any sanction for failure to comply with the directions. However, on presentation of the appeals it became clear that this did not fully cover the matters which would need to be examined in order to arrive at a just and proper resolution. Therefore, with the Board's permission, the parties developed their submissions on a broader basis.

24. In the Civil Procedure Rules for Trinidad and Tobago the term "sanction" has a precise and specific meaning. It refers to a sanction stipulated by a rule or order of the court itself, for breach of the rule or failure to comply with the order: see *Attorney General of Trinidad and Tobago v Keron Matthews* [2011] UKPC 38, paras 15-16; *Roland James*, para 19. The directions issued by Mohammed JA in the present cases were in conventional form and did not stipulate a sanction as penalty for non-compliance with them. The effect of this was that, if there was non-compliance with the directions and a question arose how the court should proceed in the light of that, the party who failed to comply would be subject to the general case management power of the court under CPR Part 26.1. That power would fall to be exercised so as to further the overriding objective in CPR Part 1, just like any other power or discretion of the court arising under the Rules or any order made under the Rules.

25. CPR Part 26.6(1) requires a court to specify a sanction for breach of any order or direction when it can. It is desirable for the court to seek to foster predictability and clarity for the parties to proceedings in this way when it is feasible or desirable to do so. But in many cases it will not be feasible or desirable to do so. For instance, at the time when an order is made or directions are given it may be difficult for a court to predict with any confidence the circumstances which might affect the justice of imposing any particular penalty for non-compliance. In particular, depending on the circumstances, it may be difficult to say in advance that imposition of a penalty in the form of a pre-determined sanction is appropriate. The Rules themselves recognise that this is the case, since they make provision for an application to be made for an "unless order" (ie an order which does carry a specified sanction, see CPR Part 26.3) or for the court to impose some as yet unspecified sanction (eg to strike out a claim or an appeal, such as under CPR Part 26.2 or Part 64.13) after it becomes clear that some other rule or order has not been complied with.

26. In giving conventional case management directions for the hearing of the appeals in these two cases, Mohammed JA was plainly entitled to consider that the situation in each case was not such as to call for the specification of any sanction in the order which the court made. No one suggested that he should include any sanction in the directions order. Judged at the time the directions were given, the circumstances in which there might be a failure to comply with them were many and various and it was not appropriate to specify a pre-determined sanction at that stage.

27. This did not mean that there would be no consequences attaching to non-compliance with the directions. On the contrary, aside from the obvious consequence that an extension of time would be required for the filing of any written submissions, the effect would be as stated in para 24 above. Any party who failed to comply with them would be at risk of suffering such detriment as the court might think it right to impose in the exercise of its discretion, having regard to the need to further the overriding objective. A party who has failed to comply with a step directed by the court should seek an extension of time, and should understand that it might be refused.

28. The Board would add that even if CPR Part 26.6(1) had had the effect that Mohammed JA should have stipulated a sanction for non-compliance with the directions, it is doubtful that this would have had any impact in the circumstances of these cases. The parties knew from the terms of the directions what they were required to do and must have appreciated that failure to comply with an order of the court would carry consequences. In the absence of a specified sanction in the order itself, they should have appreciated that the court would be bound to decide what the consequences would be by acting so as to further the overriding objective.

29. The further issues in the Cricks' appeal are whether it was open to the Court of Appeal to dispose of their appeal as it did without first considering CPR Part 64.13 and,

more generally, whether the Court of Appeal erred in dismissing their appeal without considering the merits of the case. In that regard, Mr Blaize for the Cricks submitted that the court had failed to give sufficient weight to its responsibility to determine their case on its merits and had erred by failing to work through the matters listed in CPR Part 1 point by point to ensure they were all taken into account and then weighing them up against each other.

30. In the Board's view, there is nothing in these points. CPR Part 64.13 gives the Court of Appeal a power to engage in active case management of its own motion by giving notice with a view to striking out a notice of appeal or counter-notice, should it choose to do so. But it does not impose any duty on the court to manage its list in that way. It is the responsibility of the parties to prepare properly and to be ready for an appeal hearing which has been listed. In the Cricks' case, the Court of Appeal did not seek to exercise its power under CPR Part 64.13 and was not under any obligation to do so. It did not have to give notice to the Cricks that it was considering striking out their appeal. As mentioned above, the court did not strike out their appeal; it dismissed it on the merits at the substantive hearing when no submissions (written or oral) were presented in support of the appeal.

31. In the Board's judgment, the Court of Appeal was fully entitled not to grant the Cricks' application for an adjournment of the hearing of the appeal, which they only made on the day of the hearing. Also, in the circumstances which had arisen as a result of the Cricks' failure to comply with the court's order for directions, the Court of Appeal was fully entitled to decide that it would be unfair to Mr Brown to allow counsel for the Cricks to advance the appeal by means of submissions of which no notice whatever had been given to him.

32. The Cricks had ample notice under the directions to ensure that they filed their written submissions in time. If for any reason circumstances arose which meant they were unable to comply with the directions, they ought to have alerted the court to the problem by making a prompt application for an extension of time well in advance of the hearing date. This would have meant that the timetable could be adjusted (if that was fair to Mr Brown) in such a way as to ensure that the hearing date would be effective or would have allowed the court to list another hearing for that date while postponing the Cricks' appeal, so that overall other litigants would not be affected. The Cricks failed to make use of the opportunities available to them to present their case. There is no unfairness to them in the way the Court of Appeal determined their appeal. This is a case in which the Board has no hesitation in dismissing the Cricks' further appeal and in supporting the Court of Appeal's "commendable desire to encourage a new litigation culture" and "the steps that it is taking to rid Trinidad and Tobago of the 'cancerous *laisser-faire* approach to civil litigation'" (see *Keron Matthews*, para 19).

33. Contrary to the submission of Mr Blaize for the Cricks, the Court of Appeal was not under any obligation to work through the factors set out in CPR Part 1 as aspects of the overriding objective as if they were a checklist before it could properly decide how to proceed. The overriding objective is central to case management under the Rules and is well understood by judges. It was not incumbent on the Court of Appeal to refer in terms to CPR Part 1. Nor was it incumbent on the court to work through each element in the definition of the overriding objective in CPR Part 1 before coming to its decision. The court was entitled to focus on the most important features of the case which in its view indicated the just result on the Cricks' application for an adjournment and for an extension of time. Simple case-management decisions do not call for elaborate reasons of the kind Mr Blaize proposed. To require such reasons to be given would not add significantly to the quality of decision-making and would take up unnecessary time and make the courts far less efficient in dealing with straightforward and familiar types of case.

34. The further issues in Mr Philip's case are whether it was just in all the circumstances for the Court of Appeal to dismiss his appeal and whether, even if it was not, Mr Philip's present appeal should be dismissed on the grounds that his underlying appeal to the Court of Appeal is wholly without merit.

35. The Board considers, with respect, that the Court of Appeal did proceed too hastily to dismiss Mr Philip's appeal. Although Mr Philip's written submissions had been filed late, they were still available to the Commissioner and AG, and also to the court, some weeks before the listed hearing date for the appeal. In the Board's view, had counsel for the Commissioner and AG been instructed in proper time at the start of 2017 (when their then attorney dropped out of the picture) or even promptly after the filing of Mr Phillip's written submissions on 24 February 2017, they would have been in a position to produce written submissions in advance of the appeal hearing in time to allow the hearing to proceed. The Commissioner and AG had a responsibility to assist the court to further the overriding objective (see CPR Part 1.3), and had they acted promptly and properly the hearing date could have been effective. Unlike in the Cricks' case, in the circumstances which had arisen it was by no means obvious that it would have been unfair to allow Mr Philip's counsel to proceed to present his submissions. The Commissioner and the AG had been on notice for weeks of what he was proposing to say. The court had had an opportunity to read the written submissions in advance of the hearing to assist it in its preparation.

36. In the Board's judgment, the Court of Appeal erred in Mr Philip's case by failing to consider whether it would be fair (and in accordance with the overriding objective) or not to allow his counsel to present substantive submissions on his appeal, either as part of its reasoning on the question whether an extension of time should be allowed for the filing of his written submissions or, even if a formal extension of time were refused in relation to such filing, by considering whether to allow his counsel to make oral submissions. The observation of Mendonca JA set out at para 18 above supports this

inference. It was not correct to say that counsel for the Commissioner and AG was unable to proceed with the hearing because of the delay in the filing of Mr Philip's written submissions. The true reason, on the information available to the court, was that the Commissioner and AG had themselves failed to instruct counsel in good time to prepare for the hearing of the appeal. It was thus arguable that fairness, judged in the light of the overriding objective, should have favoured permitting counsel for Mr Philip being allowed to proceed to present his submissions on the appeal. The Board has not seen all the papers in the case, including the written submissions filed by Mr Philip, and is not in a position itself to determine whether or not the Court of Appeal should have allowed submissions to be made on his behalf, nor what form any such submissions (if allowed to be made) should have been in.

37. In the event, the alternative submission for the Commissioner and AG, that Mr Philip's appeal was bound to fail, was not pressed orally by their counsel on the appeal to the Board. It would require detailed consideration of the merits of the case, on which the Board has not had the benefit of any judgment by the Court of Appeal. The Board cannot be confident that the appeal to the Court of Appeal was bound to fail and does not consider that Mr Philip's present appeal can be dismissed on this basis.

38. The Board concludes, therefore, that Mr Philip's appeal should be allowed and his case remitted to the Court of Appeal to reconsider his appeal, including the question whether his counsel ought to be allowed to present the substance of the submissions which he wishes to make.

Conclusion

39. The Cricks' appeal is dismissed.

40. Mr Philip's appeal is allowed and his case is remitted to the Court of Appeal.